

DEFENSIVELY-ARMED MERCHANT SHIPS AND SUBMARINE WARFARE

(ABRIDGED EDITION)

BY

A. PEARCE HIGGINS, M.A., LL.D.

OF LINCOLN'S INN, BARRISTER-AT-LAW
LECTURED ON INTERNATIONAL LAW AT
THE LONDON SCHOOL OF ECONOMICS

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PREFACE

IN July, 1914, I prepared a paper on "Armed Merchant Ships" which I had undertaken to read at the meeting of the International Law Association, which was to be held at The Hague in the following September. The meeting having been abandoned in consequence of the outbreak of war, the paper was published as a pamphlet (Stevens and Sons, London); it also appeared in the October number of the *American Journal of International Law*. On February 18, 1916, the Senate of the United States ordered it to be printed as a Senate document. In March of the present year I also published another pamphlet with the same title as the present (Stevens and Sons, London); the following pages are an abridgment of this.

It is hoped that the short statement given in these pages may be of assistance in enabling the

general public to take a clear view of the legal grounds on which Great Britain and her Allies base their case against the acts of the submarines of the Central Powers.

A. PEARCE HIGGINS

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Practice in the past.

THE right of merchant ships to go armed in self-defence is one of long standing, and as regards Great Britain injunctions in the form of Royal Proclamations and Acts of Parliament are to be found ordering merchant ships to carry arms from the early part of the 17th century onwards. The practice was not confined to British ships, but was in general use, and the Prize Courts of Great Britain, France and the United States recognised the right of armed resistance by belligerent merchant vessels to enemy visit and capture. With the increase in the size of warships and guns, and the abolition of privateering in 1856 by the Declaration of Paris, and the absence, after the close of the Napoleonic war, of any important naval war in the 19th century except the American Civil War of 1861-65 the practice of arming merchant ships fell into abeyance. However, on two occasions (in 1877 and 1894) the right of American ships to carry arms for self-defence was affirmed

by American Secretaries of State. It may be asserted without contradiction that when the British Admiralty in 1913 decided to call on British shipowners to arm some of their vessels, no evidence either in the legislation of States, the decisions of Municipal or Prize Courts, or in the writings of International lawyers, could be found against the legality of the practice ; the right was unquestioned. The Italian, Russian and United States Naval Codes, in addition to the decisions of Prize Courts and International lawyers of Great Britain, the United States, France, Germany, Italy, Belgium and Holland, asserted that the crew of a belligerent merchant ship had the right forcibly to resist capture.

*German attempt to discredit the practice of
arming.*

As if to prepare the way for the procedure which Germany has followed since the outbreak of the present war, two Germans lawyers, both connected intimately with the German Navy, Dr. Schramm and Dr. Triepel, in 1913 attacked the long-established practice and took up the attitude that as resistance was not allowed to persons who are not members of the armed forces of a State in land warfare, therefore it was also unlawful for merchant seamen to defend their ships from capture by warships. This reasoning failed to convince the distinguished body of International lawyers com-

posing the Institute of International Law, who at their meeting at Oxford in 1913 without any dissentient vote, Dr. Triepel, who was present, not even voting against them, passed a set of rules for naval warfare, including one which stated that it was lawful for merchant ships to defend themselves against the attacks of enemy ships.

Some differences between land and sea warfare.

Germany is a great military power, but she has yet to learn that the law of sea warfare is different from that of land. In many ways it is more humane; certain, however, it is that the law of the sea as it has been universally understood does not permit of the treatment as *francs-tireurs* of merchant seamen who defend their ships from capture. It is a German International lawyer, Dr. Hans Wehberg, writing since the outbreak of the present war, who says, "One can in no way draw conclusions for sea warfare from principles which have found common recognition in land warfare."

What are some of the differences? Private property on land is not liable to be confiscated, but at sea the capture of private property has always been permissible, and has often proved in the past, as it is proving to-day, one of the most effective and economical means of producing the paralysis and stagnation of the national life of a belligerent. Again, non-combatants on land, so

long as they refrain from all interference with military operations, are not liable to be made prisoners of war, but it is an ancient rule of maritime international law that all merchant seamen whether they defend their ship or not are liable to be so treated when their vessel is captured. Herein is seen one of the reasons for allowing a merchant vessel to carry arms in self-defence: not only is it to assist the owner whose vessel is certain to be condemned and confiscated if captured, but also it is in the interest of the crew, for the latter form a valuable reservoir on which the State navy may draw for recruits, and for that reason they were liable to be made prisoners of war. It is true that by one of The Hague Conventions of 1907 they are to be liberated if they give their word not to take any part in operations of war, but failing that, they still become prisoners of war on capture. On land the private citizen who is not a member of the armed forces of the State or of a national levy rising at the approach of an invading army is invariably treated with the greatest severity if he takes part in hostilities, and this is intelligible. The army of occupation must be protected from risings and from secret attacks by the apparently peaceful citizen who may not change his character from day to day; if he is a non-combatant and desires to retain his privileges as such he must remain one in deed as well as in name. But the merchant seaman has always to face the danger of capture as a prisoner

of war whether he defends his ship or not. There is none of the danger to the enemy in the forcible resistance of a crew of a merchant ship that follows from the action of the *franc-tireur* on land. The crew of a merchant ship is a body of men acting together in the defence of their ship and their liberty, a body of identifiable individuals who by the customary law of nations have received combatant privileges when resisting capture by an enemy warship.

The German Prize Regulations on armed merchant ships.

Notwithstanding the views put forth by Dr. Schramm, the legal adviser to the German Admiralty, the Imperial Naval Prize Regulations, published in Berlin on the 3rd August, 1914, recognise the right of an armed merchant vessel to offer armed resistance to the right of visit, search and capture by providing that in case of such resistance the crew are to be treated as prisoners of war. The Regulations only speak of an *armed* vessel offering *armed* resistance. The *Brussels* was unarmed, and Captain Fryatt defended his ship by heading for a submarine which approached. He had every right by the Law of Nations to do so, but he was shot as a *franc-tireur* of the sea. The omission of any reference to unarmed resistance from the German Naval Prize Regulations cannot repeal or annul a right

given to every seaman by the immemorial custom of nations.

The attitude of neutral States to defensively-armed merchant ships.

What view have the neutral States taken of the defensively-armed merchant ship since the outbreak of the present war? With one single exception they have all admitted the armed merchant ships of Great Britain and her Allies to their ports on the footing of unarmed ships. Some States have made special regulations in order to safeguard their neutrality and to enable the armed merchant ship to prove that she is only armed for self-defence. The Regulations of the United States issued on the 19th September, 1914, and the 25th March, 1916, were the most elaborate and detailed*; those of other States, such as Spain, Uruguay, and Chile, are more concise; in the majority of cases no special regulations have been issued. Holland is the one exception to the otherwise universal rule of admittance, and she treats the defensively-armed merchant ship in the same way as a warship, viz., by excluding both classes from her ports except in case of distress or bad weather. This action of Holland cannot be justified on legal grounds, and expediency and policy must be the explanation of her attitude. Since the case of the *Alabama* and the other Confederate cruisers that cleared from English ports

* The United States ceased to be neutral in April 1917.

during the American Civil War and were the cause of Great Britain having to pay over three million pounds as indemnity for their depredations on the Federal commerce, neutral States have exercised more diligence as to the use made of their ports by belligerent merchant ships. They are also bound to exercise this care owing to the possibility of merchant ships, and particularly armed merchant ships, being converted into cruisers after leaving their ports. Every State (Holland excepted), however, has satisfied itself that the defensively-armed ships of the Entente Powers are merchant vessels, neither more nor less, because they carry one or two guns for defence, and that no violation of their neutrality will be the consequence of admitting them to their ports. This confidence is well founded.

What armament may merchant ships carry ?

The armament which merchant ships may carry is not limited by any rule of law. In olden days ships often carried as many as 30 guns or even more. To-day, practical considerations place a limit on the number and calibre of the guns, such, for example, as the capacity of the vessel to carry them and their mountings, and the number available. It is, however, certain that circumstances may require that in cases where the vessel is strong enough an increase in her armament may be found to be necessary where the

danger from the enemy vessels is increased. The mounting of several guns on the bows, stern, and amidships does not make a merchant vessel any less a peaceful trader than the possession of one placed in the stern. So long as the guns are used for defence and not for offensive purposes the vessel continues to be a non-combatant merchant ship. The distinction between defensive and offensive armament is, in a sense, meaningless, the same guns may be used for both purposes. It is not the nature of the armament, but the use which is made of it that may make it offensive.

Only commissioned ships can act offensively.

Only a duly commissioned warship is entitled to act entirely on the offensive. This may take the form of attacking without warning warships of the enemy, or visiting, searching, and capturing enemy or neutral merchant ships. These are acts which the defensively-armed ship may not do under penalty of being treated as an unlawful combatant by the enemy.

Should armed ships be commissioned ?

It is sometimes urged that all armed merchant ships should be commissioned as warships and that their officers should be given commissions in the Royal Naval Reserve. There are several conclusive reasons why this course should not be pur-

sued. In the first place it would appear to be an admission that the German contention is sound, and that only warships are entitled to carry armament and defend themselves. Secondly, owing to the conditions of entry and stay in neutral ports which are imposed on warships by international law, they would be unable to fulfil their commercial functions in trading with such ports. And thirdly, if armed ships were commissioned the Germans could do legally what they are now doing illegally—namely, sink them at sight. As to the officers and men being commissioned and enrolled in the Royal Naval Reserve, that would, of course, be done if the ships were commissioned; but if not it would in no way, from the standpoint of international law, entitle them any the more to defend their ships than they are entitled as officers and men of the mercantile marine under the common law of nations.

What is defence?

The form that defence may take will vary according to the circumstances, and for the unarmed merchant ship one of the chief methods of beating off a submarine is by heading for it. This method has often proved effective; the submarine is made to submerge, its power of vision is lost while the merchant ship presents the smallest possible target for attack. The merchant ship then gets an opportunity to escape. The armed merchant ship need not wait to be attacked before opening

fire. Any offensive movement, any indication that a submarine is approaching or pursuing a merchant ship with hostile intent gives the master at once the right to open fire or take such other steps as he may think most suitable to ward off an impending attack. There is no need to await the striking of the first blow from the adversary: if this were done there would generally be no chance of a reply. Since visit is the first act of capture, it is to be presumed, as the British Instruction to the Commanders of defensively-armed vessels states, "that any submarine which deliberately approaches or pursues a merchant vessel does so with hostile intention," since British and Allied submarines are forbidden to approach merchant vessels.

Some general principles of the laws of naval warfare.

Before dealing with the new problem involved in the use by the Central Powers of submarines as commerce-destroyers, it will be well to state some fundamental rules of international law relating to naval warfare, and then to see if and how far they are capable of observance by submarines.

1. All merchant ships are liable to be visited and searched by commissioned warships of a belligerent State. Visit and search are necessary to ascertain the nationality and status of the merchant ship and are an essential preliminary to capture. Visit and search are rights conferred on

belligerents by the laws of war as against neutrals, while as against enemies they are ancillary to the right of capture, and it has become a duty, imposed by the customary law of nations to avoid bloodshed of non-combatants and to give effect to the recognised exemption from capture of certain classes of enemy ships, for warships to visit enemy merchant vessels. This operation may be effected on the high seas or within the territorial waters of one of the belligerent States. All enemy merchant ships are liable to capture and condemnation, with a few exceptions, such as hospital ships, inshore fishing boats, small boats engaged in local trade, cartel ships, &c.

2. Neutral vessels must not resist the exercise of the right of visit and search by belligerent warships ; if they do so they are liable to capture and condemnation.

3. Merchant vessels of belligerents have the right to resist visit and search ; if they do so they may be compelled by force to surrender. When resistance has ceased, or the vessel has hauled down her flag, it is the duty of the captor to make every reasonable effort to save all on board. The crew, on surrendering, become prisoners of war, and as such must be treated with humanity. When captured, merchant vessels should be taken into a port of the captor and proceedings in Prize Courts taken for their due condemnation. One of the chief reasons for this is because almost invariably neutral property or rights are involved.

4. Captured enemy vessels may be destroyed under special circumstances, but before the vessel is destroyed all persons on board must be placed in safety and the papers on board must be preserved. This was clearly recognised by the German Naval Prize Regulations (Art. 116).

5. A merchant vessel, though armed, must not act as a warship. It therefore must not attempt to visit, or search, or in any way interfere with or obstruct the operations of other merchant vessels or fishing boats of any nationality.

6. An armed merchant ship, if attacked, may not only defend itself, but may, if strong enough, overpower its assailant and sink or capture it.

7. A British merchant ship cannot change its status into a warship on the high seas. All States do not recognise this rule, and it was primarily with a view of meeting the possibility of the conversion on the high seas of merchant ships into warships, which several important Powers contended was lawful, that the British Admiralty reverted to the old policy of seeing that the mercantile marine carried armament for self-defence.

The general law of resistance by merchant ships.

The old law was developed in relation to warfare which was conducted by non-submersible vessels. The master of a belligerent merchant ship, seeing on the horizon a suspicious vessel, either determined to attempt to escape by flight,

or realising the impossibility of this procedure, he had two courses open to him—either to continue his voyage and wait till summoned to surrender by the enemy cruiser, and then to haul down his flag, or he might decide to resist. This decision would largely depend on the type of ship whose approach he was awaiting. If she were a heavily armed warship, he would generally decide to avoid useless waste of life, but if she were a privateer or a small and lightly armed cruiser, he would, and in practice often did, defend his ship.

Assuming that he decided to adopt the latter course, the cruiser overhauled the merchant ship, and when within gunshot hailed her, but the latter was under no obligation to wait till summoned to surrender before opening fire. The evidence of offensive action on the part of the enemy was and is sufficient.

The right of a belligerent merchant ship to resist visit.

The right to resist capture includes the right to resist visit and search, and the latter includes the right to resist approach. As soon as the belligerent merchant ship is aware that an enemy warship shows an intention to effect its capture, that is the moment for the offensive-defensive to commence. Dr. Wehberg, a German International lawyer, writing in 1915, is clear on this point: "The enemy merchant ship has then the

right of defence against an enemy attack, *and this right he can exercise against visitation, for this is indeed the first act of capture.*" The possibility that a merchant ship might carry guns and resist visit and capture was always present to the minds of the captains of warships and privateers, but it was never suggested that they were entitled, without warning, to open fire at a distance with heavy guns or torpedoes on enemy merchant ships merely because of the possibility that if they went closer it might be found that the merchant vessel carried guns and would defend herself. "The presumption was conclusive that the war vessel would be sufficiently strong to overcome and render useless any defence. If not, so much the worse for the attacking party. He was not permitted to make the merchantman's possible strength the excuse for a surprise attack," said Professor Minor at a meeting of the American Society of Interstate Law. Dr. Eliery Stowell, of Columbia University, New York, expresses the same view when he says : "If a belligerent wishes to prey upon his enemy's commerce he must be in sufficient strength to overcome the armament which will be opposed against him by the merchantman."

Has the abolition of privateering destroyed the right of merchant ships to arm in self-defence ?

It has been urged that the arming of merchant vessels was introduced to enable them to

resist the unlawful actions of privateers, or to resist pirates, and that, as privateering has been abolished by the Declaration of Paris, and piracy is no longer a danger to navigation, the reason for arming has ceased. This assertion cannot be sustained by evidence. Privateers were duly commissioned warships as much as those of the regular State Navy, and the danger apprehended from the modern converted cruisers, which have in a sense taken the place of the old privateers, was the prime reason for the Admiralty's policy in 1913 of approaching British shipowners, in order to encourage them to make provision against the possibilities of the conversion on a large scale on the high seas of merchant ships into cruisers. The fact is that the proceedings of the modern enemy submarine are far more barbarous and inhuman than those of the privateers of old, and Professor Ellery Stowell adduces two cogent reasons, with which I entirely agree, for the continuance of the practice of arming merchant ships.

They are: "First, because the wholesale sinking of vessels has been brought about by new conditions. There is now more reason that belligerents should be allowed to arm their merchantmen, so as to interpose a reasonable obstacle to an excessive recourse to this terrible practice.

"Secondly, belligerent merchantmen now carry large numbers of non-combatant passengers, many of whom are neutrals. Until there is some

guarantee that the lives of these passengers will be adequately protected before the vessel is sunk, and that they will not be placed in boats too far from land or in rough weather, it would be contrary to the fundamental principles of law and common sense to interfere with the right of the merchantman to provide whatever protection it can muster. With the advent of the submarine and other new inventions which make it possible to conduct successful raids on belligerent and neutral commerce, even where the belligerent is not in control of the seas, it would be more logical to do away with the exorbitant right of sinking vessels."

A third reason may be added—namely, that the effectiveness of submarines would be greatly increased if they were freed from the possibility of any resistance by armed merchant ships, while there would be no guarantee of their complying with the laws of war.

Can Germany make new laws for her submarine warfare?

The submarine being a new instrument of war, and the existing rules of the law being found to be detrimental to its use as a commerce destroyer, it is urged that by reason of its fragile character as an offensive weapon the rule of self-defence by enemy merchant ships must be abandoned, and other rules introduced for the protection of the submarine, so that it may, without incurring danger,

effect the capture and destruction of enemy merchant vessels. But this is entirely contrary to all the principles of war. If a belligerent is allowed to use force against his adversary, it is not for him to complain if the weapon employed is of insufficient strength. It is for him to assure himself that the weapon he uses will be strong enough to overcome all possible resistance. The attempt to change existing rules to the advantage of the party that is not in command of the surface of the sea, is an attempt to avoid the consequence of naval weakness. War is not to be conducted on the analogy of handicapping rules of a race meeting.

This question of the right of Germany to make new laws for the conduct of her submarine warfare has another aspect which must not be overlooked. The high seas are the highway of the ships of all nations, neutrals and belligerents, and neutrals are entitled to travel freely on the merchant ships of the belligerents without danger of running greater risk than the inconvenience which is the necessary consequence of the capture of the vessel. The attacks without warning on merchant ships have shown that, even on the most favourable assumption, the imperfect and limited vision of the submarine has led to the sinking of neutral vessels. In the case of the American vessel, the *Gulflight*, Herr von Jagow admitted that "the American flag was first observed at the moment of firing the shot," and in the case of the *Nebraskan*, another American ship, the German Memorandum

of the 15th July, 1915, stated that "in the twilight, which had already set in, the name of the steamer was not visible from the submarine"; while in the case of the attack on the Cunard steamer, the *Orduna*, the excuse made by the German Memorandum of the 9th September, 1915, was "the difficulty of observation, caused by the unfavourable weather." The Entente Allies take their stand on the long-established rules of International Law, which have been evolved in the interests of humanity, and as safeguards of neutral rights. These are both negated by the proceedings of the Central Powers. It is, therefore, not only in their own interests, but also in those of neutrals that they protest against the view that Germany can, by reason of the defensive weakness of submarines, make new rules and advance claims which would put not only belligerent but neutral shipping at their mercy. Submarine warfare against commerce is, from the nature of the instrument used, bound to inflict injury on neutrals, both in their person as well as in their property, by the indiscriminate sinking of prizes, whereby the protection given by the Declaration of Paris is rendered wholly illusory. Even in the case of a belligerent whose good faith was irreproachable, mistakes would certainly be made and neutral ships would be sunk. This certainty makes it imperative to prohibit absolutely the use of submarines in commercial warfare.

German methods of submarine warfare are illegal.

The methods of warfare pursued by the submarines of the Central Powers during the present War raise questions not alone for their enemies, but for neutral Powers. British and Allied ship-masters may defend and resist attack on their vessels, but meantime hundreds of neutral vessels are being sunk in defiance of the rules of International Law. The United States Government, while still on a neutral footing, engaged in lengthy correspondence with the German Government in regard to the injury inflicted on American passengers who have been victims of the submarine warfare. It obtained certain promises, but compromise is impossible on this subject ; the choice is a clean-cut one between the barbarity of submarine warfare as conducted by the Germans and the respect for law and humanity of the rules developed by the custom of nations. Attempts at compromise are rendered nugatory owing to another illegal practice engaged in by the German Alliance in sowing the high seas with mines in the track of neutral commerce. If the torpedo is not seen, a mine is pleaded—though such a plea ought to have no hearing. One proceeding is as lawless as the other.

Are German submarines pirates ?

German submarine warfare is as much a violation of the law of nations as was the action of the

ships of the Barbary Powers, which ultimately was stopped by the joint action of Europe and America when the squadron commanded by Lord Exmouth destroyed the pirates' stronghold. It may not be technically correct to speak of German submarines as "pirates," for they are ships of war commissioned by a sovereign Power, whose commanders are obeying the orders of the Higher Command, but pirates within the meaning of the old definition of "*hostes humani generis*" they are showing themselves to be, and neutral writers do not hesitate to call them such. A distinguished American lawyer, Mr. Everett P. Wheeler, speaking of the action of the German submarines, says: "It is clear that up to the time of the war now raging such warfare as that which the submarines are carrying on was unlawful. It would have been, I think, generally considered piratical."

Mr. Wheeler is not alone in this opinion. In an article in the important Dutch monthly, *De Gids*, of December, 1915, on "The Unfreedom of the Open Sea," the Dutch writer, after referring to the method of blockade pursued by Great Britain and her Allies, and pointing out that "that manner of blockading will in the future certainly not be considered against the principles of international rights," passes on to consider the German submarine policy. On this he says: "Totally different stands the case of the manner in which Germany tries to rule over any portion of the open sea. It is certain that the civilised

nations will never justify such a destruction of human lives and goods, which, from a military point of view, is also ineffective. For that method goes completely against the principles of international law, which, in so far as warfare at sea is concerned, are based on humanity and military purpose, next to mutual interest of all parties. That law can, therefore, never adapt itself to the German method of warfare. To excuse such action, which totally runs against the customs of international law and against every notion of humanity, the German Government said that it is usually for a submarine too dangerous to investigate beforehand the ship's papers, and that self-preservation compelled the submarines to act as they did. That may be so, but then the German Government ought to have concluded from that the simple fact that such warships are completely unfit for the task imposed on them. What, indeed, would any sane man say of a policeman who, without any investigation, shoots down an apparently suspicious person because he is afraid to talk to him? It is, therefore, not at all surprising that the action of German submarines against the merchant ships of all nations has caused in all civilised countries indignation and anger, and that they are looked upon as pirates."

Piracy is not too strong a term to use in connection with a method of warfare whose crowning act was the destruction of the *Lusitania*, and which has, since the opening of the submarine campaign,

destroyed hundreds of neutral ships, and has caused the deaths in British vessels alone of nearly 4000 non-combatants, men, women and children, many of whom were neutral subjects lawfully travelling on such vessels. The loss of life occasioned by the destruction of neutral ships is not known, but it has been serious.

What are the Allies' rights against German submarines ?

The Allies have broken down the submarine attack in its earlier phase ; they will do so yet in its later and, for neutrals, more dangerous manifestations. The results of the present war will not be affected by the submarine attacks on the commerce of the world, belligerent and neutral. Whatever may be the stern action which the Allied Governments may deem necessary to take during the war to put down the submarine attacks, it is certain that their demands will, at the termination of the war, be of the severest character when they recall to the memory of the German Government that it was on its proposal that in The Hague Convention on the laws and customs of war on land in 1907 there was inserted an Article which provides that a belligerent party violating the provisions of the Regulations for land warfare should, if the case demanded, be liable to make compensation, and that it should be responsible for all acts committed by persons forming part of its armed forces (Article 3).

What is the position of neutrals ?

The situation of neutrals is equally grave. Neutral Governments have had frequent occasion to protest vigorously against the conduct of war by Germany and her Allies. Neutrals, too, are probably considering whether it is not time for them to take the step of arming their merchant ships in self-defence and ordering them to resist visit and search by submarines of all belligerents. British and Allied merchant vessels may lawfully do this, both as regards submarines and other warships, but the existing law provides that as a rule a neutral may not. "It is a wild conceit," said Lord Stowell, "that wherever force is used it may be lawfully resisted; a lawful force cannot lawfully be resisted." The only case where it can be so is in the state of war and conflict between two countries where one party has a perfect right to attack by force and the other an equal right to repel by force; but in the relative situation of two countries at peace with each other, no such conflicting rights can possibly co-exist. "The penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search." But Lord Stowell was considering a case where "the utmost injury threatened is the being carried in for inquiry at the nearest port, subject to a full responsibility in costs and damages if this is done vexatiously and without just cause." Far otherwise is the

condition of the neutral merchant ship to-day. Her captain often has no opportunity of submitting to visit and search, and if he does so he has to accept the rough-and-ready decision of the young German commander of the submarine who, in the great majority of cases, has held that the vessel was carrying contraband of sufficient quantity to render the vessel liable to condemnation, and that military necessities prevented his taking her into port and, therefore, she was forthwith destroyed, crew and passengers, at the best, being allowed to take to the boats. A passing neutral merchant ship or a destroyer of a belligerent or a neutral Power summoned by wireless may or may not have rescued them from death by drowning.

In the past, when neutral States considered that a belligerent was acting in a way injurious to their subjects, they have either individually or collectively taken steps to protect them. It is not necessary to refer in detail to the Armed Neutrality Leagues of 1780 and 1800, though it is not unimportant to remember that both were formed against Great Britain for the enforcement of rules which the latter Power declined to recognise as part of the Law of Nations.

The action of the United States in this connection was more striking and forms a more important precedent for neutral States in the present juncture of affairs. France was in close relationship with the United States, treaties of amity, com-

merce and alliance having been entered into between these Powers in 1778. But France was bitterly chagrined that the United States had granted rights to Great Britain similar to those which she enjoyed under the Treaty of Commerce of 1778, and acts of aggression commenced on American commerce in 1796 of a similar character to those complained of by the Northern Powers. The proceedings of the French privateers and Prize Courts, particularly those sitting in the West Indies, at length caused the President to withdraw the *exequaturs* of the French Consuls, but not until Congress had passed an Act on 25th June, 1798, which permitted the arming of American merchant vessels for the purpose of defence against capture as well as to "subdue and capture" any armed French vessel. There was, however, a reservation that the President might thereafter instruct the armed merchantmen to submit to search, when French armed vessels should observe the Law of Nations. A subsequent Act of 7th July, 1798, abrogated treaties between France and the United States, and another of 9th July, 1798, gave the President power to instruct commanders of public armed vessels to capture any French armed vessel, and to issue Letters of Marque to privateers. The nature of the relationship brought about between the United States and France by these proceedings is a matter on which American lawyers and politicians do not agree.

Whatever the position, the Government of the

United States by way of retaliation for the illegal treatment of American ships, cargoes and crews, authorised the latter to defend themselves, and the former to carry guns for the purpose of resisting visit and search. After nearly two years of "partial" war France and the United States agreed to a settlement of their differences.

Some twenty years ago fears were entertained that the torpedo boat would act as the German submarines are acting and sink enemy ships at sight. The especial features which belong to submarines, their secret methods of attack and their vulnerability were attributed to torpedo boats, and it was suggested that these afforded reasons why the prevailing rules of law should not apply to them. The answer given by the distinguished French Admiral, Admiral Bourgois, to such arguments is as true to-day as it was then. "The advent of the torpedo, whatever its influence on naval *matériel*, has in no way changed international treaties, the law of nations, or the moral laws which govern the world. It has not given the belligerent the right of life and death over the peaceful citizens of the enemy State or of neutral States." Professor Dupuis in discussing the question of sinking vessels without visit and search points out that the indiscriminate destruction of enemy ships must necessarily, on occasion, involve the destruction of neutrals also. Visit and search are necessary to ascertain the nationality of a vessel, flags are no necessary criterion of

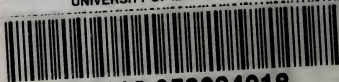
nationality, the usages of the sea admit of enemy merchant ships flying neutral flags. Then follows this passage in which is discussed the right of self-defence of all vessels, enemy or neutral, against a proceeding in all respects similar to that with which the whole shipping of the world is now faced. "Certainly if the aggressors contented themselves with data so doubtful (*i.e.*, the flag or the build of the ships) every neutral ship would be justified in treating as pirates the torpedo boats which should dare to send a ship to the bottom on such feeble evidence ; not only would it be justified in law, but the interest of its security would oblige it, provided it had a gun on board, in aiming it without hesitation at every torpedo boat heading for it. Enemy or neutral, cruiser or merchant vessel, every ship will have the right and the duty of treating as enemies the frail barks which have become a peril for all." For "torpedo boat" in this passage read "submarine" and the doctrine is equally good to-day.

The United States before making a formal declaration of the existence of a state of war on April 6, 1917, decided to arm their merchant ships to resist the illegal acts of the German and Austrian submarines. It remains for the neutral Powers to decide whether they will arm their merchant vessels and, so long as these illegal methods continue, authorise them to resist visit and search by belligerent submarines. Neutral Powers are the sole judges of the policy

which they consider best calculated to protect the interests of their citizens: they have other methods open to them; but in examining anew the question of defensively-armed merchant ships in the light of current events it has not seemed irrelevant to envisage the subject, not only from the standpoint of belligerents, but also from that of neutrals. The latter, doubtless, have claims to advance against Great Britain and the Allies for acts done *jure belli*. They can and do appeal with confidence to the Prize Courts of these countries. Little redress have they so far been able to obtain from the Prize Courts of Germany, whose decisions are based upon their Naval Prize Regulations, and only on the Law of Nations so far as it does not conflict with them.



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